Supreme Court, U. S.
FILED
AUG 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 78-186

JACQUELINE RICH,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

IRL B. BARIS
2020 Railway Exchange Building
611 Olive Street
St. Louis, Missouri 63101
(314) 231-1312
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions, Statutes and Rules Involved	4
Statement	9
Reasons for Granting the Writ	14
I. Continuance	14
II. Electronic surveillance	19
III. Interview of witnesses	22
IV. Favorable evidence of unavailable witness	25
V. Submissible case (legality of Nevada prostitution)	30
VI. Adoption of related petition for certiorari	33
Conclusion	33
Appendix A—Opinion of Court of Appeals, dated June 7, 1978	A-1
Appendix B—Judgment of Court of Appeals, dated June 7, 1978	A-20
Appendix C—Order of Court of Appeals, dated July 3, 1978, denying rehearing	A-21
Appendix D—Excerpts from testimony of Kathleen Waggoner before grand jury, June 1, 1977	A-22

Citations

Cases

Alderman v. United States, 394 U.S. 165 (1969) 3, 21, 22

Brady v. Maryland, 373 U.S. 82 (1962) 3, 28, 30

Chambers v. Mississippi, 410 U.S. 284 (1973) 30

Everitt v. United States, 281 F. 2d 429 (5th Cir. 1960) .. 17

Gavino v. MacMahon, 499 F. 2d 1191 (2nd Cir. 1974) .. 18

Kent v. Dulles, 357 U.S. 116 (1958) 32

Lerma v. United States, 387 F. 2d 187 (8th Cir. 1968) ... 32

McQueen v. Swenson, 498 F. 2d 207 (8th Cir. 1974) ... 23
Mortensen v. United States, 322 U.S. 369 (1944) 32

Stans v. Gagliardi, 485 F. 2d 1290 (2nd Cir. 1973) 17
State v. Berstein, 372 S.W. 2d 57 (Mo. 1963) 24

Thomas v. Wyrick, 535 F. 2d 407 (8th Cir. 1976) 23
Twitchell v. United States, 313 F. 2d 425 (9th Cir. 1963) 32

United States v. Allen, 409 F. 2d 611 (10th Cir. 1969) .. 29
United States v. Allison, 474 F. 2d 286 (5th Cir. 1973) .. 29
United States v. Didier, 542 F. 2d 1182 (2nd Cir. 1976) .. 18
United States v. Long, 449 F. 2d 288 (8th Cir. 1971) 24
United States v. Lovasco, 431 U.S. 783 (1977) 2
United States v. McCarthy, 292 F. Supp. 937 (S.D.N.Y. 1968) 24
United States v. Milano, 443 F. 2d 1022 (10th Cir. 1971) 29
United States v. Millican, 414 F. 2d 811 (5th Cir. 1969) 17
United States v. Mitchell, 354 F. 2d 767 (2nd Cir. 1966) . 17
United States v. Ploeger, 428 F. 2d 1204 (6th Cir. 1970) . 17
United States v. Walker, 537 F. 2d 1192 (4th Cir. 1976) . 17
United States v. Vole, 435 F. 2d 774 (7th Cir. 1970) ... 24

Constitutional Provisions

Fifth Amendment, Constitution of the United States 4

Sixth Amendment, Constitution of the United States 4

Statutes

Title 18, United States Code:

§ 1952 32
§ 2421 ..... 5, 9, 10, 11, 31
§ 2422 ..... 4, 6, 9, 10, 11, 31
§ 2510 et seq. 4, 22
§ 2518(10)(a) 22
§ 3504 22

Rules

Rule 16(a), Federal Rules of Criminal Procedure 6, 20, 21, 22

Rule 16(d)(1), Federal Rules of Criminal Procedure 3, 7, 20, 21, 22

Rule 804, Federal Rules of Evidence 3, 7, 28, 29, 30

Miscellaneous

Canon 39 of Professional Ethics 25

Comisky, Declare an End to Judicial Quotas, 36 Federal Bar Journal 30 (1977) 19

Weinstein's Evidence, para. 804(b)(1)[05], page 804-68 30

Wharton, Criminal Evidence (12th Ed., 1955), § 470-471 29

Wharton, Criminal Evidence (12th Ed., 1955), § 483 29

Wright, Federal Practice and Procedure, § 412, page 141 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

JACQUELINE RICH,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Jacqueline Rich, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on June 7, 1978.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on June 7, 1978, in an opinion which has not yet been officially reported. The opinion is re-

produced as Appendix A hereto. (The panel of the Court of Appeals consisted of Chief Judge Gibson and Circuit Judges Ross and Webster. A footnote to the opinion states that Judge Webster heard the oral argument, participated in the conference and concurred in the result, but he was not sitting on the Court at the time of the filing of the opinion because of his appointment as Director of the Federal Bureau of Investigation.)

On July 3, 1978, the Court of Appeals entered an order denying petitioner's petition for rehearing in banc and denying the petition for rehearing. (See Appendix C.) No opinion was written, and the order has not been officially reported.[1]

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 7, 1978. (See Appendix B.) A timely petition for rehearing and suggestion of appropriateness of rehearing before another panel or in banc was denied on July 3, 1978. (See Appendix C.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[1] Actually, petitioner filed a petition for rehearing and suggestion of appropriateness of rehearing before another panel or in banc. The reason for the suggestion of another panel was that, in the government's brief in the Court of Appeals, there were at least nine references to matters outside the record; it was suggested that the government's brief be stricken and that either no brief or a new brief be filed for reargument before a different panel or before the Court in banc. The Court of Appeals did not refer to this suggestion in the order of July 3, 1978, denying the petition for rehearing. Compare *United States v. Lovasco*, 431 U.S. 783, 798-799 (1977) (Stevens, J., dissenting).

QUESTIONS PRESENTED

I

Whether the Court erred in refusing to grant a reasonable continuance of the trial, beyond two weeks from arraignment, in order to give petitioner an opportunity to prepare for trial in Missouri on matters occurring also in Illinois and Nevada.

II

Whether electronic surveillance and recordings of telephone conversations of petitioner, admittedly in the possession of the government, should have been produced, pursuant to Rule 16 of the Federal Rules of Criminal Procedure and *Alderman v. United States*, 394 U.S. 165 (1969).

III

Whether the Court erred in denying petitioner an opportunity to interview government witnesses prior to trial, where such witnesses were either in the protective custody of the government or their whereabouts were known to the government.

IV

Whether the Court erred in approving the failure of the government, contrary to *Brady v. Maryland*, 373 U.S. 83 (1963), to produce grand jury testimony containing favorable evidence negating one count of the indictment and having relevance to all other counts, and in refusing to permit petitioner to introduce the transcript into evidence as former testimony of an unavailable witness, admissible under Rule 804 of the Federal Rules of Evidence.

V

Whether the Court erred in submitting the cause to the jury, including the question of whether voluntary interstate travel for the sole purpose of engaging in legalized prostitution in conformity with Nevada laws constitutes a violation of the Mann Act (18 U.S.C. §§ 2421 and 2422).

VI

Whether certiorari should be granted for reasons which may be set forth in a separate petition of petitioner's co-defendant.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes of the United States

Title 18, United States Code

§ 2421. Transportation generally

Whoever knowingly transports in interstate or foreign commerce or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

§ 2422. Coercion or enticement of female

Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or dabauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to

interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

* * * * * * *

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a w itten statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Federal Rules of Evidence

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

Petitioner Jacqueline Rich, a defendant below, was convicted on seven counts of an eight-count indictment (R.1),[2] charging her with conspiracy and substantive violations of the Mann Act, 18 U.S.C. §§ 2421 and 2422. A co-defendant, Lloyd Pelton, was charged in four of the counts and convicted on two.[3] The first four counts related to a series of events involving travel between St. Louis, Missouri, and Chicago, Illinois, for prostitution purposes, and the last four related to travel between St. Louis, Missouri, and Winnemucca, Nevada.

Count One charged that between September 29, 1976, and October 2, 1976, petitioner and Ann Frazier, as defendants, and Etta Williams, as an unindicted co-conspirator, conspired to violate 18 U.S.C. § 2421, with overt acts being basically the same as the allegations of substantive counts Two, Three and Four. Count Two charged that on September 30, 1976, petitioner alone violated 18 U.S.C. § 2421 by transporting and causing to be transported in interstate commerce from St. Louis to Chicago, one Kathleen Waggoner, for the purposes of prostitution, debauchery and other immoral purposes. Counts Three

---

[2] The following abbreviations used in this petition refer to documents filed in the Court of Appeals:

"R"—Original designated Record on Appeal.

"Supp. R."—Supplement to Record, filed November 8, 1977.

"Tr."—Transcript of trial testimony (338 pages), including arraignment and sentencing.

"Supp. Tr."—Supplementary Transcript of Trial proceedings (22 pages), including argument on motions immediately prior to commencement of trial.

Petitioner has requested the Clerk of the Court of Appeals to certify and transmit the foregoing documents to this Court in connection with this petition.

[3] These two defendants were represented by separate retained counsel and were tried jointly in the United States District Court for the Eastern District of Missouri, Hon. H. Kenneth Wangelin, District Judge, presiding.

and Four were identical in allegations to Count Two, except that the dates alleged in each were September 29, 1976, and the women who traveled were Kathy Bray and Charlotte L. Anderson, respectively.

Count Five charged that between October 7, 1976, and October 15, 1976, petitioner and co-defendant Pelton conspired to violate 18 U.S.C. § 2421, with overt acts similar to the substantive allegations in Counts Six, Seven and Eight. Count Six charged that on October 13, 1976, petitioner and co-defendant Pelton, in violation of 18 U.S.C. § 2422, persuaded, induced and enticed Shirley Dawson to go in interstate commerce from St. Louis to Nevada, with the intent and purpose on their part that the woman should engage in the practice of prostitution, and that the defendants did thereby knowingly cause the woman to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce. Counts Seven and Eight were identical to Count Six, except that the dates were October 7 and October 15, respectively, and the women who traveled were Kathy Bray and Charlotte L. Anderson, respectively.

Petitioner and her co-defendant were indicted on July 7, 1977. Petitioner was arraigned on July 18, 1977 (Tr. 1), and entered a plea of not guilty (Tr. 3). She was given ten days in which to file pre-trial motions, and the trial was set for August 1, 1977 (Tr. 4). The pre-trial motions were duly filed, and they were overruled on August 1, 1977 (Supp. Tr. 2-14). To the extent relevant to the questions presented by this petition, these motions will be discussed more fully in the Reasons portion of this petition. The Court also overruled motions of petitioner and Pelton for a continuance (Supp. Tr. 15-21), and immediately thereafter trial commenced on August 1, 1977 (Tr. 4). (The defendant Frazier was not tried with petitioner and Pelton, as she had apparently indicated a willingness to dispose of her case in Chicago (Supp. Tr. 16), under the provisions of Rule 20 of the Federal Rules of Criminal Procedure.)

The cause was submitted to the jury on August 3, 1977, and the jury returned a partial verdict on that night (Tr. 326-327), and a verdict as to the balance of the counts on August 4 (Tr. 334-335). The jury found petitioner guilty on all counts except Count Eight, and Pelton guilty on Counts Five and Seven, and not guilty on Counts Six and Eight.

For the Court's convenience, a summary of the allegations of the indictment and the verdicts follows:

Count	Statute	Dates	Women Involved	Defendants	Verdict
One	§ 371	9-29 to 10- 2-76	Anderson Bray Waggoner	Rich Frazier	Guilty Not Tried
Two	§ 2421	9-30-76	Waggoner	Rich	Guilty
Three	§ 2421	9-29-76	Bray	Rich	Guilty
Four	§ 2421	9-29-76	Anderson	Rich	Guilty
Five	§ 371	10-7 to 10-15-76	Dawson Bray Anderson	Rich Pelton	Guilty Guilty
Six	§ 2422	10-13-76	Dawson	Rich Pelton	Guilty Not Guilty
Seven	§ 2422	10- 7-76	Bray	Rich Pelton	Guilty Guilty
Eight	§ 2422	10-15-76	Anderson	Rich Pelton	Not Guilty Not Guilty

Most of the evidence in the case came from witnesses and exhibits produced by the prosecution. Petitioner presented no evidence although she wanted to use the grand jury testimony of Waggoner (see Question IV herein); Pelton testified in his own behalf.

The evidence tended to show the following: Fred Coughlin testified that he had previously secured women for prostitution purposes from petitioner (Tr. 68-71), and he talked to her in September or October, 1976, with reference to furnishing women for the boat show in Chicago (Tr. 71-72). Thereafter Coughlin and a business associate met two young women at petitioner's house, and all four drove to Chicago where they shared hotel rooms (Tr. 72-78). He did not pay the girls or petitioner any money in connection with the Chicago trip (Tr. 86).

Kathy Bray testified that she and Anderson were the two girls who went to Chicago with Coughlin and his friend, and that later Waggoner came to Chicago with Etta Williams, also known as Agnes Brittain. The purpose of the trip was for the three women, Anderson, Bray and Waggoner, to engage in prostitution, and they were sent there by petitioner who said they would be managed by Williams (Tr. 105-109).

The government did not call Anderson, Waggoner or Williams as witnesses in connection with the Chicago trips. Petitioner subpoenaed Waggoner as a witness but she refused to testify because she was awaiting trial on a perjury indictment. An issue is raised in this petition connected with her unavailability as a witness. (See Question IV presented in this petition.)

With reference to trips to Winnemucca, Nevada, Bray and Shirley Dawson testified that in October, 1976, Pelton made phone calls from petitioner's house to someone in Winnemucca, Nevada, for the purpose of making arrangements for women to travel there to engage in prostitution. Petitioner and Pelton were to share in their earnings, and petitioner loaned money for plane fares and clothes. Thereafter, Bray, Dawson and Anderson traveled separately to Winnemucca by airplane. The women registered with the Winnemucca Police Department, as required by local regulations, but Bray did not secure a police license because she had misrepresented her age (Tr. 27-30, 110-121, 182-191). A representative of the Police Department testified that prostitution is legal in Winnemucca, Nevada (Tr. 33). Bray and Dawson each testified on cross-examination that they were not coerced or forced to go to Nevada (Tr. 123, 164-165, 168, 195-196, 210).

Pelton testified in his own behalf and generally denied the testimony of Bray and Dawson. He denied that he had made arrangements for them to travel to Winnemucca, or that he had participated in any prostitution activities other than as an occasional customer (Tr. 243-251).

At the close of all the evidence, the cause was submitted to the jury after argument and the Court's charge to the jury (Tr. 289-321), to which the defendants made certain objections (Tr. 257-285, 321-323). The jury deliberated during the evening but did not complete their work and resumed their deliberations the following day. They returned verdicts as previously indicated.

On August 19, 1977, petitioner was sentenced to a term of imprisonment of five years on each count, most of which were concurrent, and her total sentence was ten years; Pelton was sentenced to a total of three years imprisonment (Tr. 336-354). At the conclusion of the trial, petitioner's bond was terminated, and she is presently confined at Alderson, West Virginia.

Petitioner and Pelton each duly perfected their separate appeals to the United States Court of Appeals for the Eighth Circuit. Oral argument was consolidated and on June 7, 1978, a joint opinion (Appendix A) was rendered affirming the convictions of both defendants. Petitioner's timely petition for rehearing was denied on July 3, 1978. (See Appendix C.) (The petition for rehearing of Pelton was filed after that of petitioner and was denied on July 24, 1978.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming the conviction of petitioner Jacqueline Rich.

REASONS FOR GRANTING THE WRIT

I

Continuance

The indictment herein (R. 1) was filed on July 7, 1977, but petitioner did not become aware of it until she was arrested and released on bond on July 11. She appeared before District Judge Wangelin for arraignment on July 18 (Tr. 1), and the Court set the cause for trial on August 1, 1977 (Tr. 3). Defense counsel at that time advised the Court that the date was not convenient because of plans to move his office (Tr. 3). The Court indicated that he was going on vacation toward the end of August and wanted to clear his criminal docket before leaving; after giving petitioner ten days in which to file motions, the Court implied that the trial would probably not be held on August 1: ". . . the setting of August 1 will be maintained and we'll take it from there and see what happens at that time." When defense counsel suggested alternate dates before the Court's vacation, the Court said that the matter would be set for August 1 and "we'll get to it as soon thereafter as possible" (Tr. 4).

On July 27, 1977, within the time permitted by the Court, petitioner filed a number of pre-trial motions, including a motion for continuance (R. 24). In addition to the moving of counsel's office, petitioner set forth other reasons for a continuance, including inability to complete the investigation, the fact that events alleged in the indictment had to be investigated in Illinois and Nevada, the lack of contact between defense counsel because of scheduling problems, uncertainty as to the status of co-indictee Frazier, delays in discovery, and the refusal of the government to advise as to the whereabouts of prospective witnesses.

The co-defendant Pelton had also filed a motion for continuance (R. 19) based upon his counsel's other court commitments, out-of-town travels, press publicity affecting the case,[4] and necessity of interviewing out-of-town witnesses. On July 27, 1977, the government filed a written response to Pelton's motion for continuance (R. 21), requesting a denial of the motion for the reason that a continuance would cause "great inconvenience" to the government and witnesses. There was no mention of any threats to witnesses as the government claimed in court five days later.

When the case was called for trial on August 1, petitioner announced not ready and referred the Court to the pending motion for a continuance (Supp. Tr. 2). All of the other motions filed by petitioner had not been ruled upon, but they were quickly overruled (Supp. Tr. 2-14).

The Court then took up the motion for a continuance. After reference to the move of his office, petitioner's counsel discussed the difficulties of investigating a case involving facts occurring in Nevada and Chicago, and the need for research of Nevada law (Supp. Tr. 15-16). Government counsel acknowledged that co-defendant Frazier had not been in St. Louis for any discussions with other defendants concerning the case (Supp. Tr. 16). To the Court's request as to the amount of time needed for preparation, petitioner's counsel stated that they could be ready for trial prior to the Court's vacation and that there would therefore be no inconvenience to the Court (Supp. Tr. 17). Pelton's counsel also explained his difficulties in preparing for trial as a result of out-of-town trips and involvement in other court matters (Supp. Tr. 18-19).

---

[4] As to the publicity, petitioner filed a separate motion for transfer of the cause (R. 35) which was summarily overruled by the District Court immediately prior to the start of the trial (Supp. Tr. 12-14) and without affording an opportunity to make a record on the press coverage (Supp. Tr. 14).

Government counsel made some veiled accusations as to possible pressure upon government witnesses, but there was no evidence presented that either defendant was responsible, and government counsel indicated that these government witnesses were in protective custody (Supp. Tr. 18-20). On the basis of these unsubstantiated allegations, which were denied by defendants, and which apparently were discussed earlier in a private conversation between the Court and government counsel (Supp. Tr. 19), the Court said "We'll start the voir dire examination in this case just as soon as we can get to it" (Supp. Tr. 20).[5]

We recognize that many cases have ruled that the matter of a continuance is within the sound discretion of the trial Court, but we believe that this case presents an example of an abuse of discretion for which the judgment of conviction must be reversed and a new trial ordered. When we consider the personal difficulties of counsel and the inability to consult with each other or to investigate the factual and legal background of

[5] We disagree with the characterization by the Court of Appeals of petitioner's argument in support of a continuance as "speculation", and the government's opposing argument as based upon "specific and cogent reasons". It is true, of course, that petitioner was unable to present evidence of a specific defense witness who was unavailable, but petitioner did refer to the necessity of interviewing Ann Frazier in Chicago (Supp. Tr. 16), and obviously there were witnesses in Nevada who should have been interviewed. If it is only speculation, then the inability to be more positive was a direct result of the lack of investigative time. Certainly counsel could not in good faith represent what would be testified to by witnesses whom he had been unable to interview because of the Court's desire to try the case quickly.

As to the "reasons" in support of the government's position, we do not know the content of what was presented to the trial Court *ex parte*, but the government statement in open court was the rankest form of speculation (Supp. Tr. 18). The unsubstantiated accusations that threats emanated from the defendants were contradicted by the fact that petitioner did not see the discovery material until twenty-four hours before trial (Supp. Tr. 18). The red herring technique of the government's speculation became even more apparent during the course of the trial, when witness Kathy Bray broke down in Court (Tr. 134), almost as if by design after she had volunteered that she had been offered protection (Tr. 120). She was subsequently questioned on voir dire examination as to her reasons for being afraid, and she said that she heard it from Shirley Dawson and Agnes Brittain (Etta Williams)—both antagonistic to petitioner—but she had not "personally been threatened by either of these defendants" and never "heard either of these defendants threaten anyone else" (Tr. 173-174)!!

But even if there had been threats to any witness, we submit that there are adequate procedures to protect witnesses in danger, including the drastic remedy of bond revocation upon appropriate proof. A premature trial without adequate preparation, based upon unproved allegations of threats, is not a satisfactory or constitutional solution.

this case, not only in the St. Louis area but also in Illinois and Nevada, we believe a reasonable continuance should have been granted. Counsel assured the Court that it would have been possible to properly investigate the case and be ready for trial even before the Court's vacation.

Although the amount of time provided for trial preparation was less than in the instant case, there was a recognition in *United States v. Millican*, 414 F. 2d 811, 814 (5th Cir. 1969), that time is needed for counsel "to check out both facts and law, particularly in a case involving events occurring at a locality other than the place of trial." Distance from the scene where the case should have been investigated was also a factor in the reversal for failure to grant a continuance in *United States v. Ploeger*, 482 F. 2d 1204 (6th Cir. 1970). See also *United States v. Walker*, 537 F. 2d 1192 (4th Cir. 1976), and *Everitt v. United States*, 281 F. 2d 429 (5th Cir. 1960).

In *United States v. Mitchell*, 354 F. 2d 767, 769 (2nd Cir. 1966), the Second Circuit was sensitive to the desirability of a speedy trial under the Sixth Amendment, but cautioned: "At the same time, however, the desire for expedition can furnish no justification for the subversion of the Sixth Amendment right to present an effective defense through counsel." In *Stans v. Gagliardi*, 485 F. 2d 1290, 1291-1292 (2nd Cir. 1975), the Court discussed its rules relating to speedy trials, and, although

unable to order the District Court to postpone the trial, Circuit Judges Friendly and Feinberg left no doubt as to their position as to the propriety of a reasonable continuance. In dissent, not from the principle that a continuance was required but from the decision that there was no present power in the Court of Appeals to order the continuance, Judge Lumbard recognized (l.c. 1293) the constitutional implications of the problem as well as the deleterious effect on the administration of justice.

In another Second Circuit decision, *Gavino v. MacMahon*, 499 F. 2d 1191 (2nd Cir. 1974), the facts are similar but are not as strong as those in the instant case. There more than two months had elapsed from date of indictment to the date set for trial, counsel also had other commitments, discovery material had been furnished two weeks before trial,[6] and it was necessary for counsel to interview prospective witnesses who were out of town. The Second Circuit said (l.c. 1196), in discussing the rules for prompt disposition of criminal cases:

> ". . . They were never designed to permit a district court to ride roughshod over the right of a defendant to prepare for trial. . . .
>
> "Without minimizing the importance of the public interest in prompt disposition of criminal cases, we cannot allow our concern with calendar dispatch to triumph over a defendant's right to a fair trial, which is the foundation of our system of justice. To sacrifice a fair trial to the interest of expedition would surely undermine the true administration of justice."

See also *United States v. Didier*, 542 F.2d 1182, at fn. 6 (2nd Cir. 1976), that the "speedy trial rules cannot be used to deprive a defendant of adequate opportunity to prepare his defense."

[6] In the instant case, discovery started a little over a week before trial (Supp. Tr. 17), but some material was not furnished until the morning of trial (Supp. Tr. 2).

The problem of a "too speedy" trial was recognized in Comisky, *Declare an End to Judicial Quotas*, 36 Federal Bar Journal 30, 37 (1977), where the author quotes from several respected authorities, including Chief Judge Swygert of the Seventh Circuit and Chief Judge Kaufman of the Second Circuit, to support his axiom that:

> *"Slow justice is always preferable to speedy injustice."*

The denial of a reasonable continuance of the trial deprived petitioner of the due process of law and fair trial guaranteed by the Fifth Amendment to the Constitution of the United States. Petitioner may have been accorded the speedy and public trial required by the Sixth Amendment, but it was at the expense of other Sixth Amendment rights, particularly the right to compulsory process for witnesses and the effective assistance of counsel.

Because of the conflict of the decision of the Court of Appeals herein with decisions of other Courts of Appeals and because of the impact of this decision on the administration of justice with reference to pre-trial investigation, we respectfully suggest that certiorari should be granted as to this Question.

II

Electronic surveillance

One of the pre-trial motions filed by petitioner was to suppress the fruits of illegal electronic and other surveillance (R. 41). In it, petitioner stated that her attorney had been informed by the prosecutor that there were some recordings of petitioner's voice, and that they had been played for the Court without petitioner or her counsel being present. The government's written response (R. 51) confirmed that the electronic sur-

veillance had been played for the Court both before and after the filing of petitioner's motion.

When the matter of electronic surveillance was taken up immediately prior to trial (Supp. Tr. 9), the government filed a motion for an order under Rule 16(d)(1) of the Federal Rules of Criminal Procedure to restrict the discovery of the electronic surveillance (Supp. R. 1), and the order was immediately entered (Supp. Tr. 9).

Petitioner's counsel suggested that the tapes bearing her recorded voice, which had been played for the Court, were statements of petitioner and should have been produced under Rule 16(a) of the Federal Rules of Criminal Procedure (Supp. Tr. 10). The government contended that Rule 16(a) "makes it clear that the only statements of the defendant which are to be provided are those taken by the Government agents," and that "these statements were taken by cooperating individuals, not Government agents" (Supp. Tr. 10). The government's position was clearly erroneous because Rule 16(a) requires production of "any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government." In this instance, there were recorded statements of the defendant which obviously were in the possession of the government, for the prosecutor made them available to the Court *ex parte* ten days before trial and delivered them to the Court for retention by the Clerk (Supp. Tr. 10-12).

The suggestion in the government's Rule 16(d)(1) motion (Supp. R. 1), in the colloquy in court (Supp. Tr. 11), in the District Court order sealing the tapes and denying access to petitioner (Supp. R. 3), and in the Court of Appeals opinion that there is nothing exculpatory in the tapes, even if true, is irrelevant. Petitioner has not heard the tapes and does not

know whether they are exculpatory. But Rule 16(a) does not require production of a defendant's statements only when they are exculpatory; it requires production of all statements, exculpatory or incriminating.

The opinion of the Court of Appeals erroneously speaks of discovery as a matter of discretion; but the requirements of Rule 16(a)(1)(A) have been mandatory since the 1975 Amendments to Rule 16. Furthermore, the suggestion in the opinion that it is "difficult to understand how Rich could have been prejudiced by being denied access to the tapes" is contrary to *Alderman v. United States*, 394 U.S. 165, 182 (1969), where this Court held that the defendant must be given an opportunity to determine relevance and that "the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case."

We believe the Court of Appeals also erred in holding that the tapes could be denied to petitioner under Rule 16(d)(1). If the Rule is applicable here, there was certainly not the "sufficient showing" required by that section. The unsupported representations in paragraph 5(A) of the motion as to threats by petitioner were never substantiated. Although the District Court order (Supp. R. 3) states that the Court heard evidence of danger, the evidence was not presented or preserved in accordance with the Rule 16(d)(1) procedure. The District Court and the Court of Appeals both disregarded the requirement in the Rule of a written statement, which is permitted, under certain circumstances, to be presented in an *ex parte* showing. (The government brief in the Court of Appeals admitted that the motion "was the only writing or communication made to the District Court in this matter.")

Furthermore, a defendant should not be denied discovery material, especially that relating to electronic surveillance, on the possibility that persons or a pending investigation might be

endangered, for "disclosure must be made even though attended by potential danger to the reputation or safety of third persons or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information." *Alderman v. United States*, 394 U.S. 165, 181 (1969).

Certainly, a hearing should have been conducted to determine the legality and taint of the surveillance, pursuant to 18 U.S.C. §§ 3504 and 2510 et seq. Such an evidentiary hearing is contemplated by 18 U.S.C. § 2518(10)(a); *Alderman*, (at pp. 180-185) sets forth the procedure for such a hearing, recognizing that *in camera* examination by the trial Court is not sufficient.

The Court of Appeals has failed to interpret Rule 16(a) and Rule 16(d)(1) properly. In denying petitioner access to her recorded statements, the Court of Appeals is also in conflict with this Court's decision in *Alderman v. United States*. For these reasons, we respectfully suggest that certiorari should be granted as to this Question.

III

Interview of witnesses

In a pre-trial motion, petitioner sought to compel the government to make witnesses and statements available to the defense (R. 45). The motion alleged that certain prospective witnesses, including the unindicted co-conspirator Etta Williams (who was obviously the government's source of information leading to the indictment), were either confined or under the control and supervision of the government and therefore unavailable to the defense. As to one witness, Waggoner, the prosecutor had told petitioner's counsel to contact her attorney, although the prosecutor knew full well that such counsel was out of town. When

this motion was taken up immediately before the commencement of the trial, the Court denied the motion, except to indicate that Jencks material would be furnished prior to cross-examination (Supp. Tr. 8).

Thereafter, the prosecutor called various witnesses who were not made available to the defense and who had not been interviewed by the defense prior to their testimony. The prosecutor did not call Etta Williams and only made her available in the government office after the government rested (Tr. 214-216). The government also did not call Ann Frazier, Charlotte Anderson or Kathleen Waggoner as witnesses, and they were not made available to the defense nor were their whereabouts disclosed. (Waggoner was subpoenaed by petitioner—see Question IV of this petition.)

We believe that the failure of the government to make their witnesses available for interview constituted reversible error. With the exception of Waggoner, petitioner could not locate the witnesses, especially the two who the government admitted were in their protective custody (Supp. Tr. 20). The opinion of the Court of Appeals does not discuss the inability of petitioner to interview the key witnesses Bray and Dawson prior to their testimony.

The former Canon 39 of Professional Ethics provided:

> "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party."

Indeed there is a duty to do so. *McQueen v. Swenson*, 498 F. 2d 207, 216 (8th Cir. 1974); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir. 1976), cert. denied 429 U.S. 868 (1976).

A prosecutor must not interfere with this investigative process by concealing witnesses, as done here. That the trial Court has

some affirmative duty appears from *United States v. Vole*, 435 F. 2d 774, 778 (7th Cir. 1970):

> "In any event, since we are remanding the case, we wish to make it clear that witnesses are the special property of neither party and in the absence of compelling reasons the district court should facilitate access to them before trial whenever it is requested. See e.g., Gregory v. United States, 125 U.S. App. D.C. 140, 369 F. 2d 186, 188 (1966); Callahan v. United States, 371 F. 2d 658, 660 (9th Cir. 1967)."

See also *United States v. McCarthy*, 292 F. Supp. 937, 946 (S.D.N.Y. 1968). Compare *State v. Berstein*, 372 S.W.2d. 57 (Mo. 1963).

If the government was attempting to justify a denial of access to witnesses by the vague and unsubstantiated references to alleged threats, certainly adequate safeguards could have been provided by the Court. If there truly was a threat to the safety of witnesses, why was the threat no longer existent after the government rested—suddenly it was permissible for defense counsel to interview Etta Williams, whereas prior to trial, it was not. The Court of Appeals said that "understandably, she did not wish to speak to defendants prior to trial." Even if this statement, which was not substantiated in the record, were correct, the District Court should have followed the "better procedure" of having the witness so state, as suggested in *United States v. Long*, 449 F. 2d 288, 295-296 (8th Cir. 1971), cert. denied 405 U.S. 974 (1972). It is true, of course, as the opinion states, that petitioner interviewed Williams and decided not to call her as a witness, but had this occurred prior to trial, such an interview might have led to other witnesses whom petitioner could have called or to other investigative leads.

Obviously, the government's prime purpose was to shield the witnesses against interview and not against danger. This concealment of witnesses and the denial of access for interview by defense counsel deprived petitioner of the effective assistance of counsel and the right to process for and confrontation of witnesses, contrary to the Sixth Amendment to the Constitution of the United States.

For these reasons, we respectfully suggest that certiorari should be granted as to this Question.

IV

Favorable evidence of unavailable witness

Petitioner filed a pre-trial motion for production of favorable evidence, in which, among other documents, she requested "transcripts of the testimony of all witnesses before any grand jury which investigated this matter which is favorable to this defendant" (R. 43). When the District Court considered the various defense motions on the morning of trial, the prosecutor responded to the Court's request for an indication of what favorable evidence existed: "We have no favorable evidence, none that we know of, Judge" (Supp. Tr. 3).

Defense counsel then pointed to the pendency of an indictment against Kathleen Waggoner, the woman named in Count Two, as well as one of those named in Count One, as having been transported from St. Louis to Chicago. It was a perjury indictment[7] which indicated that she had testified before the grand jury that petitioner had nothing to do with her trip to Chicago, although the allegation in the instant indictment was that petitioner had transported or caused her to be transported. Government counsel responded that he was willing to turn over his file to the Court, but the Court indicated that this had already been done *in camera*, and that there was nothing favor-

[7] A copy of the Waggoner perjury indictment was attached to petitioner's post-trial motion in the trial court (R. 61-64).

able to the defendants, but that Jencks material (less certain expunged portions) would be made available (Supp. Tr. 3-6).

Kathleen Waggoner did not testify as a witness for the government, and therefore there was no Jencks material as to her. In view of the favorable testimony reflected in the indictment against her, petitioner desired to call her as a defense witness after the government rested. A subpoena was served on her, but, because of her pending indictment, her attorney said she would not testify and would invoke her Fifth Amendment privilege (Tr. 218). Petitioner's counsel therefore requested that her grand jury testimony be furnished so that it could be used pursuant to Rule 804 of the Federal Rules of Evidence (Tr. 219).

The government acknowledged that she had appeared before the grand jury and had testified under a grant of immunity (Tr. 219), and although the prosecutor attempted to suggest that he had not fully cross-examined her, he acknowledged that "it was a choice of ours" (Tr. 222). The government stated that "the gist of her testimony" was that Etta Williams, and not Pat Rich, had sent her to Chicago for the boat show (Tr. 224). Thus it was certainly favorable evidence for the defense because it was directly contrary to the allegations of Count Two.

The District Court seemed to base its initial ruling denying access to the transcript of grand jury testimony on the basis of the continuing grand jury investigation (Tr. 224-225). Subsequently, the Court indicated that if petitioner desired to read the entire indictment against the witness Waggoner, this might be permissible; petitioner declined to do so because it would inform the jury of a pending indictment without a conviction. Finally, the Court refused to permit defense counsel to read only those portions of her grand jury testimony reflected in the Waggoner indictment (Tr. 225-228).

As a result, petitioner was not permitted to use Kathleen Waggoner as a witness for the defense. She was an extremely important witness, because she would have contradicted the testimony of witness Bray and would, if believed, have proved petitioner's lack of involvement in the Chicago trips. The effect on Bray's testimony would also have affected the Nevada matter, about which she also testified.

In the discussion in chambers, petitioner's counsel speculated that there might be more favorable evidence in the full grand jury transcript than just appeared from the Waggoner indictment (Tr. 226-227). Our suspicion was confirmed when the transcript became available after the verdict herein. (Subsequent to this trial, Ms. Waggoner was tried on her perjury indictment, and during her trial, the grand jury transcript was introduced as Government's Exhibit 1 therein. It thus became a matter of public record, and petitioner purchased a copy from the Clerk of the District Court.)

We understand that this Court should not be burdened with matters outside the record, and in fact we complained in the Court of Appeals that the Government's brief there contained numerous matters outside the record. (See footnote 1, supra.) Recognizing that we might be subject to the same criticism, but in the light of the statement in footnote 8 of the Court of Appeals opinion that the worth of the grand jury testimony was "nugatory" because we failed to point out specific portions of the transcript which were favorable, we are taking the liberty of attaching, as Appendix D to this petition, excerpts from the grand jury transcript which, had it been available, petitioner would probably have introduced at the trial. We have italicized those portions of the transcript which were quoted in the Waggoner indictment, and the balance comes from the transcript itself.[8]

---

[8] Appendix D may not be completely accurate because the copy of the grand jury transcript which we were able to obtain is a poor copy, the pages are unnumbered and there have been obvious deletions. For a full consideration of this issue, we respectfully suggest that this Court direct the government to produce more legible copies of the entire grand jury transcript of Ms. Waggoner, including those portions which have been deleted.

It is obvious from a reading of Appendix D that there was a great deal of favorable evidence in the grand jury transcript other than that which was quoted in the Waggoner indictment. The jury should have been informed that she was introduced to petitioner by Etta Williams (also known as Agnes Brittain), that she originally worked as a prostitute for Miss Williams, that Etta Williams set up the Chicago trip, that although she was at the Drake Hotel, she did not see the other girls who were allegedly there (compare Tr. 143, 170), that she did not know Ann Frazier, the co-indictee, that Ms. Waggoner gave her prostitution fees to Etta Williams, that she knew nothing about an argument testified to by Coughlin and Bray (compare Tr. 80, 88, 158, and 170), that no one mentioned petitioner's participation in the Chicago events, that she frequently visited at petitioner's apartment during times when the government claimed that calls were being made to Nevada (relevant to contradict the evidence as to Counts Five through Eight), and that she had never been to Nevada. All of this would have been strong evidence contradicting the government's case.

On the basis of the information contained in the Waggoner indictment, the District Court should have ordered the grand jury transcript to be produced. Indeed, the prosecutor was under an affirmative duty to produce it, per *Brady v. Maryland*, 373 U.S. 82 (1963). The facts here and in *Brady* are almost identical. (We respectfully submit that, based upon *Brady*, summary reversal of the judgment below would not be inappropriate as to this Question.)

Once produced, the transcript would be admissible under the provisions of Rule 804 of the Federal Rules of Evidence. For purposes of that Rule, there can be no doubt that Kathleen Waggoner was "unavailable" as a defense witness, due to her exercise of her Fifth Amendment privilege. Rule 804(a)(1) follows the weight of authority in providing that the exercise of a claim of privilege satisfies the requirements of unavailability. See *United States v. Allen*, 409 F. 2d 611 (10th Cir. 1969); *United States v. Milano*, 443 F. 2d 1022 (10th Cir. 1971), cert. denied 404 U.S. 943 (1971), and Wharton, *Criminal Evidence* (12th Ed., 1955), § 483.

The opinion of the Court of Appeals seems to find that Ms. Waggoner was not unavailable and states that petitioner raised the issue in an "extenuated and circuitous manner" which created only speculation. We believe that the statement by the witness' attorney was sufficient, and there was no necessity to waste the Court's time by the vain effort of actually putting her on the stand to claim her privilege. The Court of Appeals completely disregarded the fact, which is clear from the discussions which took place both on and off the record in chambers (Tr. 218-228), that no one disputed the witness' unavailability (Tr. 220). The various efforts by government counsel and the trial Court to avoid the use of her grand jury testimony were not couched in terms of unavailability, and the only time government counsel expressed an uncertainty as to unavailability, he did so on the untenable theory that she had been granted immunity (Tr. 221). Obviously the grant of immunity did not make her "available", because she was under indictment when subpoenaed as a witness for this trial.

Because Ms. Waggoner met the test of unavailability of Rule 804(a)(1), her grand jury testimony was then admissible under Rule 804(b)(1), which is a codification of the prior recorded testimony exception to the hearsay rule. The testimony was under oath, it related directly to the trial of this cause, and the government clearly had an opportunity to develop her testimony by direct, cross or redirect examination.

The commentators and case law recognize that the testimony of a witness before a grand jury is in fact admissible when that witness is unavailable at the later trial. See Wharton, *Criminal Evidence* (12th Ed., 1955), §§ 470-471, and *United States v.*

Allison, 474 F. 2d 286, 288 (5th Cir. 1973), cert. denied 419 U.S. 851 (1974). The due process clause of the Fifth Amendment also required the admission of relevant portions of the grand jury testimony. See Wright, *Federal Practice and Procedure*, § 412, page 141, and Weinstein's *Evidence*, para. 804 (b)(1) [05], page 804-68. As Mr. Justice Powell stated in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973):

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Cases cited.] . . . In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."

The grand jury testimony of Kathleen Waggoner should have been made available to the defense under *Brady v. Maryland*, and should have been received in evidence undr Rule 804. Its suppression and exclusion violated petitioner's rights to Fifth Amendment due process and Sixth Amendment process for witnesses in her behalf.

We respectfully suggest that certiorari should be granted as to this Question.

V

Submissible case (legality of Nevada prostitution)

The Court of Appeals rejected petitioner's argument that the evidence was insufficient to support her convictions on any count. Although we feel strongly that there was no submissible case, we recognize that this Court has seldom reviewed such a decision, and we will not belabor the Question here.

There is, however, one issue which we do assert in this petition—whether voluntary interstate travel solely to engage

in lawful prostitution in Nevada is a violation of the Mann Act (18 U.S.C. §§ 2421 and 2422). This issue was presented to the Court of Appeals by petitioner but was not discussed by that Court, except in a brief rejection of the argument, without citation of authority, in the sections of the opinion pertaining to Pelton—see beginning of Constitutionality section and the second to last paragraph of the discussion of Count V.

The evidence was quite clear that, within the provisions of 18 U.S.C. § 2422, there was no persuasion, inducement or enticement of Bray or Dawson in making the trips to Winnemucca, Nevada. Bray testified that nobody forced or coerced her to go to Nevada (Tr. 123) and that she volunteered to go ther. (Tr. 165) because it was a good place to go (Tr. 168). Dawson testified that she wanted to go and was not persuaded or induced (Tr. 195). As to being enticed, she said that it was a matter of definition, and she went because of the potential for good money. It is obvious from their testimony that they were most anxious to go. Giving full credit to their testimony, the most that could be said is that petitioner loaned them some money, and it stretches the definition of persuasion or inducement or enticement, to the point of unconstitutional vagueness, to suggest that a loan of money would constitute sufficient evidence to prove these essential elements.

But even if the testimony of Bray and Dawson is accepted without question, it is clear from the government's case that they understood that they were going to Nevada to engage in the lawful profession of prostitution. The first thing that they did on arrival was to make an application for a permit with the local police, as required by local law (Tr. 115, 117, 118-119, 145-146, 189-190, 201-202; see also Government's Exhibits 2, 3 and 4). That they fully intended to comply with the local law is apparent from the fact that when Bray was unable to get her license, she immediately returned to St. Louis without engaging in any acts of prostitution (Tr. 118-119, 166).

We have been unable to find any reported decision on this issue, but we believe that the constitutionality of the Mann Act is subject to serious question if it is to be applied to prohibit interstate travel to engage in lawful activities. Significantly, 18 U.S.C. § 1952, which covers the same general area as the Mann Act (although it has some additional elements, including the commission of an overt act after the travel), recognizes that the activities in the state to which the travel is directed must be in violation of the state law. And see *Kent v. Dulles*, 357 U.S. 116, 125-129 (1958), with reference to the right to travel.

If as was said in *Twitchell v. United States*, 313 F. 2d 425, 428 (9th Cir. 1963), concerning the Mann Act, "federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route," then *a fortiori*, that which is permitted by state law should not be the basis of a federal crime. See also the discussion in *Mortensen v. United States*, 322 U.S. 369, 377 (1944), as to the interstate transportation being only the means for facilitating "the commission of the illegal acts."

We submit that there was no intent on the part of any of the parties involved in the trips to Nevada, including petitioner if she was involved, to violate state or federal law. Specific intent is an essential element of a Mann Act offense (*Lerma v. United States*, 387 F. 2d 187, 188 (8th Cir. 1968), cert. denied 391 U.S. 907 (1968); *Mortensen v. United States*, 322 U.S. 369 (1944)), and the proof of the requisite *mens rea* was lacking in this case.

Because of the unique issue presented herein which has not been decided by this Court and because of the effect of the decision herein on lawful state activities, we respectfully suggest that certiorari should be granted as to this Question.

VI

Adoption of related petition for certiorari

Lloyd Pelton also appealed to the Court of Appeals from his conviction in the joint trial with petitioner. Each appellant filed separate briefs, but the appeals were heard together, and a joint opinion was written, although it considered the contentions of each separately. (See Appendix A.)

Subsequently, Pelton filed a petition for rehearing in the Court of Appeals, which was denied on July 24, 1978.

Petitioner does not know whether Pelton intends to file a petition for writ of certiorari, but if he does so, petitioner requests permission to adopt those portions of his petition which may be applicable to petitioner.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRL B. BARIS
2020 Railway Exchange Building
611 Olive Street
St. Louis, Missouri 63101
(314) 231-1312
Attorney for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 77-1682

United States of America,
Appellee,

v.

Lloyd M. Pelton,
Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

No. 77-1695

United States of Missouri,
Appellee,

v.

Jacqueline Rich,
Appellant.

Submitted: January 9, 1978
Filed: June 7, 1978

Before Gibson, Chief Judge, Ross and Webster,[1] Circuit Judges.

[1] Prior to leaving this court to become Director of the Federal Bureau of Investigation, Judge Webster heard oral argument in this case, participated in the conference thereon, and concurred in the result.

Gibson, Chief Judge.

This case involves charged violations of the Mann Act arising out of certain interstate activities undertaken by a prostitution operation based in St. Louis, Missouri. In July 1977, the Government returned an eight-count indictment against Jacqueline "Pat" Rich, Lloyd Pelton and Ann Frazier.[2] The first four counts of the indictment related to travel by prostitutes between St. Louis, Missouri, and Chicago, Illinois; the second four counts related to travel between St. Louis, Missouri, and Winnemucca, Nevada.

In late September 1976, Fred Coughlin, then a sales representative for a boat company in the St. Louis area, asked Rich to provide prostitutes for a forthcoming boat show in Chicago. Rich agreed to let Coughlin take two call girls whom she employed to Chicago to "work" the boat show. She then directed Kathleen Bray and Charlotte Anderson to drive to Chicago with Coughlin. She also arranged for the separate transportation to

[2] Count I charged Rich and Frazier with conspiracy to knowingly transport women in interstate commerce for purposes of prostitution in violation of 18 U.S.C. § 2421. The overt acts offered in support of this conspiracy charge were alleged to have occurred on September 29 and 30, 1976, in connection with the transportation of three call girls to Chicago to "work" a boat show. Three of the overt acts alleged in Count I formed the basis of the substantive violations of 19 U.S.C. § 2421 with which Rich alone was charged in Counts II, III and IV. Count II charged Rich with a § 2421 violation with regard to Kathleen Waggoner, a/k/a "Monica"; Count III charged her with a similar violation with regard to Kathleen Bray, a/k/a "Baby"; and Count IV related to the interstate transportation of Charlotte Anderson, a/k/a "Frosty", in violation of § 2421.

Count V charged Rich and Pelton with conspiracy to knowingly transport women in interstate commerce for purposes of prostitution in violation of 18 U.S.C. § 2421. The overt acts offered in support of this conspiracy charge related to the transportation of three women, Shirley Dawson, Kathleen Bray and Charlotte Anderson, to Winnemucca, Nevada, for purposes of prostitution. Count VI charged Rich and Pelton with violating 18 U.S.C. § 2422 by persuading, inducing and enticing Shirley Dawson to go to Winnemucca to act as a prostitute and by causing her to be transported there as a passenger upon the line and route of a common carrier in interstate commerce. Counts VII and VIII charged Rich and Pelton with similar violations with regard to Kathleen Bray and Charlotte Anderson, respectively.

Chicago of Kathleen Waggoner, another call girl in her employ. All three women travelled to Chicago as arranged by Rich and worked as prostitutes at a boat show; while in Chicago they were managed pursuant to arrangements made by Rich. Bray became ill and returned to St. Louis earlier than the others, who returned at the conclusion of the boat show.

Upon Bray's return to St. Louis, plans were made for sending her and another call girl known as Georgia to work at Penny's Cozy Corner, a house of prostitution in Winnemucca, Nevada. According to Bray, she was present at Rich's apartment when Rich and Pelton made arrangements for this trip. Pelton called an acquaintance of his at Penny's Cozy Corner and arranged for Bray's stay there. It was agreed that he would receive $200 per girl for his placement services. Rich gave Bray $200 to buy clothes and $250 to buy an airplane ticket to Nevada and to pay for a doctor's examination and the accessories that she would need at Penny's Cozy Corner. Rich was to receive a percentage of the money which Bray earned in Nevada. Bray flew to Nevada and attempted to become licensed as a prostitute. Her application for a license was denied because she was under the age of eighteen, and she returned to St. Louis. Following Bray's return, Pelton and Rich made plans and arrangements, similar to those which they had made for her Nevada trip, for sending Shirley Dawson and Charlotte Anderson to Winnemucca. Pursuant to these arrangements, Dawson and Anderson travelled to Winnemucca in October 1976, and began to work at Penny's Cozy Corner. They quickly discovered that employment in Nevada was not as lucrative as they had imagined it would be and they returned to St. Louis after only a short tenure in Winnemucca.

Rich and Pelton were tried jointly to a jury on the charges arising from the aforesaid events.[3] Rich, who was charged in

[3] Frazier indicated a willingness to dispose of her case in Chicago under the provisions of Fed. R. Crim. P. 20; she was not tried with Rich and Pelton.

all eight counts, was found guilty on Counts I-VII and acquitted on Count VIII (Nevada trip of Anderson). She received an aggregate sentence of ten years' imprisonment.[4] Pelton, who was charged only in Counts V-VIII, was found guilty on Counts V (conspiracy involving trips to Nevada) and VII (Nevada trip of Bray) and acquitted on Counts VI and VIII (Nevada trips of Dawson and Anderson respectively). He received two concurrent sentences of three years' imprisonment.

Both defendants appeal. We first consider appellant Rich's contentions.

Continuance

Rich was arrested on July 11, 1977, and arraigned on July 18. At her arraignment, the District Court[5] set an August 1 trial date, despite protestations by Rich's counsel that this date would be inconvenient to him. On July 27, Pelton, who had also been given an August 1 trial date when he was arraigned on July 11, filed a motion for a continuance and the Government filed a written response requesting a denial of the motion. On July 28, Rich moved for a continuance.

When the case was called for trial on the morning of August 1, the District Court considered defendants' continuance motions. In support of their motions, both counsel asserted personal exigencies that had curtailed their pretrial preparation. Government counsel expressed opposition to the granting of a continuance, primarily because of his fear that delay of the trial could lead to the unavailability of several important Govern-

[4] Rich was sentenced to a five-year term of imprisonment on each of her seven convictions. She received concurrent terms of imprisonment on Counts I-IV. Her sentences on Counts V-VII run concurrently with one another, but consecutively to the sentences in Counts I-IV.

[5] The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

ment witnesses who were then in protective custody. The District Court denied defendants' continuance motions, and on the afternoon of August 1, voir dire examination of potential jurors was conducted, a jury was impanelled and trial was commenced. Rich contends that the trial court's refusal to grant a continuance was erroneous because it precluded her attorney from making adequate preparation and investigation for her defense.

We note initially that review of the trial transcript shows that Rich was vigorously defended at trial and belies the suggestion that counsel had less than adequate time to prepare for trial. The twenty-day period from time of arrest to trial appears adequate, particularly in view of the strictures of the Speedy Trial Act. Moreover, a motion for continuance is addressed to the sound discretion of the trial court, and a refusal to grant a continuance will be set aside only upon a showing of a clear abuse of discretion. *United States v. Jackson*, 549 F.2d 517, 528 (8th Cir.), *cert denied*, 430 U.S. 985 (1977); *United States v. Webb*, 533 F.2d 391, 395 (8th Cir. 1976). Counsel for Rich supported his motion for continuance with the speculation that there might be witnesses in Chicago and Nevada whom he had been unable to interview prior to trial because of the personal time strictures of his life. In opposing a continuance, the Government presented specific and cogent reasons which went to the very viability of the prosecution. On these facts, we are unable to say that the trial court abused its discretion in refusing to grant a continuance.

Discovery of tape recordings in the Government's possession

Discovery of evidence in criminal cases is governed by the provisions of Rule 16 of the Federal Rules of Criminal Procedure. Prior to trial, Rich made a request under Rule 16 for tape recordings of her voice which were in the Government's possession. Ordinarily, when a defendant requests inspection of his or her

statements which are in the possession, custody or control of the Government, the Government has a duty of disclosure under Rule 16(a)(1)(A).[6] In the instant case, the Government declined to disclose to Rich the tape recordings of her voice which were in its possession. Motivated by concern for the safety of persons cooperating on the case, whose identity would be revealed to Rich if she heard the tapes, the Government requested a protective order under Rule 16(d)(1), which provides:

> Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

In support of its request, the Government made an ex parte presentation to the court. Upon listening to the tapes, the trial judge concluded that they contained nothing exculpatory of Rich. He then made the tapes a part of the record and issued a Rule 16(d)(1) order sealing them. The tapes were not used at trial. The Government also assures us that it made no use at trial of any evidence derived from the tapes.

Rich contends, nonetheless, that the court erred in denying her access to the recordings of her voice. Discovery matters are committed to the sound discretion of the district court and an error in administering the discovery rules is reversible only

---

[6] Rule 16(a)(1)(A) provides in pertinent part:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government * * *.

on a showing that the error was prejudicial to the substantial rights of the defendant. *United States v. Crow Dog*, 532 F.2d 1182, 1189 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *United States v. Cole*, 453 F.2d 902, 904-05 (8th Cir.), *cert. denied*, 406 U.S. 922 (1972). Given the trial court's finding that the tapes contained no exculpatory evidence and the fact that the Government made no direct or derivative use of the tapes, we find it difficult to understand how Rich could have been prejudiced by being denied access to the tapes. Moreover, a review of the record reveals that the protective order at issue here was entered in conformance with Rule 16(d)(1), which specifically authorizes ex parte proceedings. The purpose of the order sought here was to protect the identity of persons cooperating on the case. An adversary proceeding would have defeated the very purpose of the requested order by revealing their identities to Rich.

A review of the record, which includes the sealed tapes at issue here, convinces us that an ex parte proceeding was appropriate on the facts of this case and that the Government made a sufficient showing for a protective order under Rule 16(d)(1). The District Court acted well within its discretion and in full compliance with Rule 16(d)(1) in denying Rich access to the tapes in the Government's possession. Furthermore, Rich has made no showing that this order prejudiced her substantial rights. Her contention regarding the Rule 16(d)(1) order is without merit.

Pretrial discovery of Government witnesses

Prior to trial, defendant Rich moved to compel the Government "to make witnesses and statements" available. Etta Williams, a/k/a "Agnes Brittain," an unindicted co-conspirator in Count I, was the only prospective Government witness identified in the motion. The District Court denied the motion and

refused to order pretrial discovery of the Government's witnesses.[7] Rich contends that the trial court erred in refusing to order pretrial discovery of the Government's witnesses. She also suggests that the Government interfered with her investigation of the case by concealing prospective witnesses from her.

Rich's attack on the District Court's refusal to order pretrial discovery of witnesses is wholly lacking in merit. Discovery of prospective witnesses is not required under Fed. R. Crim. P. 16(a), *United States v. Krohn*, 558 F.2d 390, 394 (8th Cir.), *cert. denied*, — U.S. —, 98 S. Ct. 207 (1977); *United States v. Rogers*, 549 F.2d 490, 494 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977), and we can find no abuse of discretion in the trial court's refusal to order this pretrial discovery. Moreover, there is no support in the record for the suggestion that the Government impeded Rich in the investigation of her case by denying her access to prospective witnesses Charlotte Anderson, Ann Frazier, Kathleen Waggoner and Etta Williams.

Rich employed Charlotte Anderson as a call girl. She makes no allegation whatsoever of contract between Anderson and the Government prior to trial. The Government denies having interviewed Anderson or even having known where she could be found; it did not call Anderson as a witness. Clearly there is no support for an inference of governmental concealment of Anderson. During the period in question, Ann Frazier and Kathleen Waggoner, neither of whom was called as a witness by the Government at Rich's trial, had been charged with crimes by the Government. Rich presents this sole fact as the basis for her charge of concealment by the Government. The facts of this case simply do not support an equation of indictment with concealment and we decline to infer such an equation.

---

[7] In denying defendants' motion for pretrial discovery of witnesses, the district judge made it clear that his ruling had no bearing whatsoever on the Government's duty under 18 U.S.C. § 3500 to provide defendants with statements of witnesses after they had testified on direct examination at trial. It is clear that the Government complied fully with § 3500.

Etta Williams was the Government's initial source of information in this case. Shortly after her involvement in the investigation of the case began, her apartment was fire-bombed. This event, plus another incident which suggested that her safety was in continuing jeopardy, resulted in her being placed in the protective custody of the Government and being given a new identity. Understandably, she did not wish to speak to defendants prior to trial. Rich has not shown that this reluctance on Williams' part was anything other than a matter of her own personal choice. The fact that the Government had undertaken to protect her does not transform this choice into governmental concealment. Moreover, Rich's claim of prejudice because of her inability to interview Williams prior to trial is undercut by events which transpired during trial. Williams was present on the trial dates and was made available to the defendants after the Government determined that it would not use her as a witness. Defendants interviewed Williams at that time and decided not to call her as a witness. We conclude that Rich has failed to establish that the Government precluded her from interviewing a witness willing to talk with her prior to trial or that her lack of pretrial contact with Williams was prejudicial to her defense.

Grand jury testimony of Kathleen Waggoner

Count II of the indictment underlying the instant case charged Rich with a § 2421 violation with regard to the transportation of Kathleen Waggoner to Chicago. Waggoner's trip to Chicago was also one of the overt acts alleged in support of the conspiracy charged in Count I. On June 1, 1977, pursuant to a grant of use immunity, Waggoner testified before a grand jury investigating possible violations by Rich of 18 U.S.C. §§ 1503, 1952 and 2421. During her appearance before the grand jury, Waggoner denied that Rich had sent her to Chicago in 1976 to work as a prostitute at the boat show

and also denied that Rich had ever set her up on prostitution dates. As a consequence of this testimony, Waggoner was indicted on two counts of perjury before the grand jury in violation of 18 U.S.C. § 1623. This indictment, which was handed down on June 25, 1977, set forth verbatim those portions of the grand jury transcript in which Waggoner denied that Rich had sent her to Chicago or set her up on prostitution dates. Waggoner was convicted on both counts of perjury at a trial which took place after the trial of Rich and Pelton.

In a pre-trial motion, Rich sought "the testimony of all witnesses before any grand jury which investigated this matter which is favorable to this defendant." In its answer to Rich's motion, the Government stated that it would provide grand jury transcripts only insofar as it was required to do so by 18 U.S.C. § 3500. The trial court sustained the Government's position and denied Rich's motion. This ruling was consonant with the well-established rule in this circuit that grand jury testimony is generally not discoverable on pretrial motion. *United States v. Harflinger*, 436 F.2d 928, 935 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

Waggoner was not called as a witness at Rich's trial. If the Government had called Waggoner and if she had testified, Rich would have been entitled to a transcript of her grand jury testimony under 18 U.S.C. § 3500. Rich herself did not attempt to call Waggoner as a witness. Rather, she assumed that Waggoner would refuse to testify and sought, on that basis, to introduce a transcript of Waggoner's grand jury testimony into evidence.

On the morning of the third day of trial, counsel for Rich made the following in-chambers presentation to the trial court:

> I have caused a subpoena to be served upon Kathleen Waggoner to testify. It is my understanding that she is under charges at the present time in this Court or in another Division and her attorney has indicated that he will advise her to invoke her privilege under the Fifth Amendment and refuse to testify. On that basis, Your Honor, I would request an opportunity to utilize her Grand Jury testimony and introduce portions of the Grand Jury testimony which would be relevant and request that the Government furnish me with a copy of her Grand Jury testimony. I believe that it would be admissible pursuant to Rule 804 of the Federal Rules of Evidence.

The Government objected to the use of Waggoner's grand jury testimony. The court and both parties then discussed the general nature of Waggoner's testimony before the grand jury, the use immunity under which she had testified and the perjury indictment then pending against her. The district judge ultimately refused to allow Rich to introduce the transcript of Waggoner's grand jury testimony into evidence. Contemporaneously, however, he ruled that Rich could read Waggoner's indictment to the jury. Although this indictment contained testimony in which Waggoner denied that Rich had sent her to Chicago or had set her up on prostitution dates, counsel for Rich chose not to introduce it into evidence.

Rich now contends that Waggoner's grand jury testimony was admissible under Fed. R. Evid. 804(a)(1) and that the trial court erred in refusing to allow her to introduce the relevant portions of this transcript at trial. Rule 804 sets forth those instances in which the hearsay statements of unavailable declarants may be admitted into evidence at trial. Rich relies upon § (a)(1) of Rule 804, which provides that a declarant is "unavailable" if he or she "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement."

The unavailability requirement of Rule 804 places the burden of producing an unavailable declarant upon the proponent of the evidence. *United States v. Amaya*, 533 F.2d 188, 191 (5th

Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977); *see generally* 11 MOORE'S FEDERAL PRACTICE ¶ 804.02, at VIII-239-40 (2d ed. 1976). Rich, the proponent here, accordingly had the burden of establishing that Waggoner would invoke her fifth amendment privilege and thus be unavailable to testify. Our review of the record convinces us that Rich utterly failed to carry this burden. Counsel for Rich made no effort to produce Waggoner, whom he had subpoenaed, and to demonstrate firsthand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege against self-incrimination. Rather, he chose to raise the issue of her privilege in an extenuated and circuitous manner which gave the court nothing more than speculative basis for determining whether she was available. Rich's proof that Waggoner was unavailable under Rule 804(a)(1) was that Waggoner's attorney had said that he was going to advise Waggoner not to testify. There was no indication that Waggoner had in fact been so advised or that, if she had been, she had decided to exercise her privilege. We consider Rich's suggestion, that Waggoner might in the future be advised of and then choose to exercise her fifth amendment privilege, to be a wholly inadequate showing of unavailability under Rule 804(a)(1). The trial court did not err in refusing, on this speculative basis, to allow Rich to introduce into evidence the transcript of Waggoner's testimony before the grand jury.[8]

[8] Rich also argues that the Government breached its duty of disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to release Waggoner's grand jury testimony. Under *Brady*, governmental suppression at trial of "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, supra* at 87. We can find no due process infringement in the instant case. Unlike *Brady*, where the evidence suppressed by the prosecution did not come to the defendant's notice until after he had been tried, convicted and sentenced and his conviction had been affirmed, defendant Rich clearly had notice prior to trial of the evidence at issue here and in fact had access to the crucial aspects of Waggoner's grand jury testimony through the Waggoner indictment. She chose not to introduce the indictment with this verbatim testimony into evidence. We would ordinarily be hesitant to construe a tactical decision of this nature as an indicator of the materiality of evidence. Rich's subsequent treatment of Waggoner's grand jury testimony, however, supports the initial impression that its worth to Rich's defense was nugatory. Although Rich has had access to Waggoner's grand jury testimony since Waggoner's trial, when it became a matter of public record, she has failed to specify any favorable evidence therein which she did not already have access to by way of Waggoner's indictment. On these facts, we reject Rich's claim that non-access at trial to Waggoner's grand jury testimony constituted a violation of her right to due process.

Sufficiency of the evidence

Rich contends that the evidence was insufficient to support her convictions. In considering this contention, we must view the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). We have done so and we conclude that the evidence against Rich is legally sufficient to support her convictions. Indeed, the plethora of evidence of Rich's participation in the transportation of women to Chicago and Nevada is such that we cannot find a close question of evidentiary sufficiency on any of the seven counts on which she was convicted. Under these circumstances we choose not to catalogue the evidence adduced against Rich. Suffice it to say that the evidence, when viewed in the light most favorable to the Government, is more than sufficient to support the jury's verdicts of guilty on Counts I-VII.

We will now address defendant Pelton's contentions.

Constitutionality of 18 U.S.C. § 2421

Pelton argues that since prostitution is legal in Winnemucca, Nevada, the destination of the female whose interstate transportation underlines his convictions, the Mann Act unconstitutionally violates and derogates "the rights of females to seek legal employment as guaranteed by the constitution of this

country." As we have previously noted, "[i]t is rather late in the history of the Mann Act to still be contending for its unconstitutionality. The Act has been consistently upheld * * *." (Citations omitted.) *United States v. Garrett*, 521 F.2d 444, 446 (8th Cir. 1975). Defendant Pelton is not a female whose ability to seek legal employment was constrained by the Mann Act and he consequently lacks standing to attack the statute on this basis. *See United States v. Garrett, supra* at 446. Because of his lack of standing, we pretermit analysis of the substance of his constitutional challenge, although we cannot help but note that its strength appears to lie in its ingenuity rather than in any degree of legal cogency. It is difficult to conceive of prostitution as being constitutionally guaranteed and protected.

Severance

Pelton filed a pretrial motion for severance which was denied by the District Court on July 27. At a pretrial proceeding on the morning of August 1, counsel for Pelton brought the severance issue back to the District Court's attention in a somewhat roundabout way, expressing the opinion that Pelton could not receive a fair trial because most of the evidence in the case was unrelated to Pelton. He made no formal motion for a severance at this time, however. Moreover, it is undisputed that Pelton did not renew the motion for severance at the close of the Government's evidence or at the conclusion of all the evidence. If not so renewed, the motion is "deemed waived." *United States v. Porter*, 441 F.2d 1204, 1212 (8th Cir.), cert. denied, 404 U.S. 911 (1971). Accordingly, we hold that Pelton has waived his right to assert the severance issue.

Sufficiency of the evidence

Pelton was charged in only those four counts of the indictment related to the Nevada trips. He was acquitted on Counts

VI and VIII, which charged him with inducing the transportation to Nevada of Shirley Dawson and Charlotte Anderson. He was convicted on Count V, the conspiracy charge stemming from the Nevada trips, and on Count VII, the charge involving the inducement of Kathleen Bray to travel to Nevada. Pelton contends that his convictions on Counts V and VII are not supported by sufficient evidence.

In analyzing this contention, our point of departure must be those well-worn principles which require us to view the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), and to accept as established all reasonable inferences from the evidence that tend to support the jury's verdict. *United States v. Overshon*, 494 F.2d 894, 896 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974). We must, moreover, be guided by the general rule that "it is not necessary that the evidence exclude every reasonable hypothesis except that of guilt but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty." *United States v. Shahane*, 517 F.2d 1173, 1177 (8th Cir.), *cert. denied*, 423 U.S. 893 (1975). This standard also applies in cases where the conviction rests on circumstantial evidence, *see United States v. Joyner*, 539 F.2d 1162, 1165 (8th Cir.), *cert. denied*, 429 U.S. 983 (1976); *United States v. Shahane, supra* at 1177, since circumstantial evidence is intrinsically as probative as direct evidence. *Holland v. United States*, 348 U.S. 121, 140 (1954). With these familiar principles in mind, we address Pelton's attack upon the sufficiency of the evidence supporting his convictions.

Count V

Count V charged Pelton and Rich with a conspiracy to "knowingly transport in interstate commerce a woman or girl for the purpose of prostitution or debauchery and other im-

moral purposes [a violation of Title 18, U.S.C. § 2421]." The indictment posited that in furtherance of this conspiracy Rich and Pelton agreed to send women and girls from St. Louis, Missouri, to Winnemucca, Nevada, for purposes of prostitution on various dates in October 1976, and that Rich gave Shirley Dawson, Kathleen Bray and Charlotte Anderson money to purchase tickets to Reno, Nevada.

Pelton contends generally that the evidence supporting his conspiracy conviction does not prove the existence of an unlawful agreement between him and Rich. More specifically, he argues that any agreement that may have existed was lawful because prostitution is legal in Nevada and/or because the women in question travelled to Nevada on their own volition.

"The offense of conspiracy consists of an agreement between the conspirators to commit an offense, attended by an act of one or more of the conspirators, to effect the object of the conspiracy." *United States v. Skillman*, 442 F.2d 542, 547 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971). The agreement need not be express or formal and it may be established by circumstantial evidence. *United States v. Hutchinson*, 488 F.2d 484, 490 (9th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974). Indeed, this court has long recognized that since conspiracy is rarely susceptible of proof by direct evidence, it may properly be adduced from the conduct of the parties and the attending circumstances. *Rizzo v. United States*, 304 F.2d 810, 825 (8th Cir.), *cert. denied*, 371 U.S. 890 (1962); *Goode v. United States*, 58 F.2d 105, 107 (8th Cir. 1932).

The conduct of the parties and the attending circumstances revealed by the record here support the existence of an agreement by Rich and Pelton to transport women to Nevada for prostitution purposes. Bray, one of the women so transported, testified that she was present at Rich's apartment in St. Louis when Rich and Pelton decided to send her and another call

girl named Georgia to Penny's Cozy Corner, a house of prostitution in Winnemucca, Nevada. In Bray's presence, Pelton made a telephone call to Penny's and arranged for her to work there. Pelton and Rich then gave Bray instructions on what to do when she reached Winnemucca. She was told to register as a prostitute, which would require lying about her age since she was not yet eighteen years old, to get a doctor's examination and then to go to Penny's. Bray, Rich and Pelton agreed that Bray would give 40% of her earnings to Penny's and split the remaining 60% with Rich. Bray also agreed to pay Pelton $200 for setting her up at Penny's. To finance the trip, Rich lent Bray $200 for clothes and $250 for airfare, a license and the accessories which would be necessary at Penny's. Bray subsequently flew from St. Louis to Nevada in accordance with the plans and arrangements formulated by Rich and Pelton and attempted to become a prostitute. Upon being denied a license in Winnemucca because she was under age, she returned to St. Louis. We believe that the evidence in this case was sufficient to have convinced the jury beyond a reasonable doubt that Pelton was guilty of participating in a conspiracy with Rich knowingly to transport a woman to Nevada in interstate commerce for purposes of prostitution.

We must reject as unavailing Pelton's attempt to legitimize his agreement with Rich by arguing that prostitution is legal in Nevada and that Bray had a desire to travel to Nevada and to work there as a prostitute which pre-existed his participation in the plans. Section 2421 flatly prohibits transportation of women in interstate commerce "for the purpose of prostitution or debauchery and other immoral purposes"; its prohibition is not keyed to the legality or illegality of prostitution under the law of the state where the transportation ends. When Rich and Pelton agreed to send Bray to Nevada to work as a prostitute, they made an agreement to violate § 2421, and the status of prostitution under Nevada law has no bearing on the illegality of this agreement under the Mann Act.

Equally lacking in legal merit is Pelton's suggestion that any agreement he may have had with Rich was legal because Bray was predisposed and willing to go to Nevada to work as a prostitute. Whether or not Bray was so predisposed and willing is immaterial to the illegality of Pelton's agreement with Rich to violate § 2421, for consent is neither a defense to a violation charged under § 2421, *Gebardi v. United States*, 287 U.S. 112, 119 (1932); *Hattaway v. United States*, 399 F.2d 431, 433 (5th Cir. 1968); *Wiley v. United States*, 257 F.2d 900, 905 (8th Cir. 1958), nor to a violation charged under § 2422. *Blumenfield v. United States*, 284 F.2d 46, 53 (8th Cir.), *cert. denied*, 365 U.S. 812 (1960). Pelton conspired with Rich to transport Bray in interstate commerce to Nevada for purposes of prostitution in violation of § 2421. Whatever Bray's degree of willingness to travel may have been, it does not vitiate the illegality of the agreement to transport her for purposes of prostitution.

Count VII

Count VII charged Pelton and Rich with violating 18 U.S.C. § 2422 by persuading, inducing and enticing Kathleen Bray to go in interstate commerce to Nevada with the intent on their part that she engage in prostitution there, and with thereby knowingly causing her to be transported there as a passenger upon the line and route of a common carrier in interstate commerce. In challenging the sufficiency of the evidence supporting his conviction on this count, Pelton does not dispute that Bray was transported to Nevada for purposes of prostitution. His attack on the sufficiency of the evidence pertains to the issue of inducement. He seems to contend that because there was evidence that Bray was willing to go to Nevada to work as a prostitute, the record will not support a finding of inducement on his part.

We are unable to agree. Even if we assume that Bray was willing to travel to Nevada to be a prostitute, the fact remains that by setting her up at Penny's Cozy Corner, Pelton helped provide the inducement which caused her to make the trip.[9] It is the inducement of transportation which is prohibited under § 2422, not the actual provision of that transportation. *Nunnally v. United States*, 291 F.2d 205, 206-07, (5th Cir. 1961). When an offer to travel interstate for purposes of prostitution elicits a positive response from a woman to whom it is made, it constitutes a requisite inducement under the statute. *Harms v. United States*, 272 F.2d 478, 481 (4th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960). The evidence here shows that Pelton made an inducement sufficient to persuade Bray to travel to Nevada. We believe that Pelton's conviction under § 2422 with regard to Bray's inducement is supported by sufficient evidence.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

---

[9] Indeed, the fact that until Pelton "placed" her at Penny's, Bray may have harbored an unfulfilled wish to go to Nevada to be a prostitute emphasizes rather than undercuts the causal relationship between Pelton's inducement and Bray's trip.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

No. 77-1695 September Term, 1977

United States of America,
Appellee,

vs.

Jacqueline Rich,
Appellant.

JUDGMENT

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

June 7, 1978

APPENDIX C

United States Court of Appeals
for the Eighth Circuit

77-1695 September Term, 1977

United States of America, Appellee,

vs.

Jacqueline Rich, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 3, 1978

APPENDIX D

Before the United States Grand Jury
Eastern District of Missouri
Eastern Division

In re: Grand Jury Investigation No. 1
Transcript of Testimony of

Page

Kathleen Wagner 2

June 1, 1977

Appearance: David M. Rosen, Esq., Assistant United States Attorney, Department of Justice, United States Court & Custom House, 1114 Market Street, St. Louis, Missouri 63101

KATHLEEN WAGNER

being first duly sworn, testified as follows:

By Mr. Rosen:

Q. Will you state your name for the Grand Jury?

A. Kathleen Leona Wagner.

* * * * * * *

Q. Do you know a person named Pat Rich?

A. Yes, I do.

Q. And how do you know her?

A. I met Pat through Agnes Britton.

The Foreman: Pardon me, I don't think many of the jurors can hear you.

A. I had met Pat Rich through Agnes Britton.

Q. How did you meet Agnes Britton, then?

A. I met her through a man by the name of Jim, I don't remember his last name.

Q. Now when you met Agnes, were you working for Agnes at any time?

A. Yes.

Q. O. K., and what services did you perform for Agnes?

A. Prostitution.

Q. Now approximately when did you meet Agnes? I realize you probably don't have an exact date.

A. No, I don't.

Q. O. K., was it in 1976?

A. It was last year.

Q. O. K., 'seventy-six; was it in winter, spring, fall, summer?

A. In August, I think it was.

Q. So in approximately August of '76 you would have met Agnes?

A. Yes.

Q. Now how long from the time you met Agnes was it until you met Pat Rich?

A. Two months; I was with Agnes for two months, and then she had introduced me to Pat.

Q. So this was around October, then, of '76?

A. Yes.

Q. Now for what purpose did Agnes introduce you to Pat Rich?

A. I had went down and bought a car from Pat's car lot.

Q. This is Lucky Autos?

A. Yes.

Q. And was that the only reason for your meeting Pat?

A. Yes.

* * * * * * *

Q. Did you see Pat at least once a day before you moved in?

A. Would you repeat that?

Q. Before you moved into Pat's apartment, did you go there at least once a day?

A. At least, yes.

Q. How long would each visit be, approximately?

A. Not very long.

Q. Would you be there at any particular time, always morning, always afternoon, always night, or was it varied?

A. It was different times.

* * * * * * *

Q. *In September or October of last year, did you go to Chicago?*

A. *Yes, I did.*

Q. Who did you go with?

A. Agnes Britton.

Q. *What was your purpose in going to Chicago?*

A. *Prostitution.*

Q. Where did you stay in Chicago?

A. Well, we stayed in the Drake Hotel, and we stayed at one of Agnes's girl friends.

Q. What is her name?

A. I don't remember, I really don't.

Q. Ann Frazer?

A. That don't ring a bell.

Q. And does this girl friend live in Chicago?

A. I don't know that either, I had never been up there Agnes had took me.

Q. Who else was up in Chicago with you?

A. There was Agnes, and myself, and that's—me and her, and she tried to get a couple of other girls to work up there, another girl by the name of Marilyn or Madeline, I don't really remember, she introduced me to so many people.

Q. *And you didn't meet any other of Pat's working girls in Chicago—or Etta's working girls, in Chicago—prostitutes?*

A. *No, no one other than just Madeline.*

Q. Did you stay with anyone in particular, male, in Chicago?

A. No.

Q. What exactly were you doing up in Chicago, no prostitution; for any particular event?

A. There was—Agnes had told me something about a show boat, and she told me I could make some money up there, so I went up there; she took me.

Q. You didn't meet anybody else?

A. None other than Agnes's dates that she had up there.

Q. O. K.; so you met some of Agnes's dates?

A. Yes, I did.

Q. Who are they?

A. I don't know; I don't remember their names.

Q. Do you remember what business they worked for?

A. No.

Q. And you don't remember an argument over anyone up there?

A. No; not right offhand I don't.

* * * * * * *

Q. Let's start again with the Chicago trip. Who was it that set up the Chicago trip?

A. Agnes Britton.

Q. *To you knowledge, did Pat Rich have anything at all to do with your going to Chicago for the boat show in September or October of 1976?*

A. *None that I am aware of.*

Q. Did anyone ever mention this, Pat Rich's participation?

A. No.

Q. How did you get to Chicago?

A. Agnes drove me up there and drove me back, drove me on up there and drove me back.

Q. O. K., she drove you up the first time, and then she drove you back to St. Louis?

A. Yes, she did.

Q. Why did she take you back to St. Louis?

A. She told me there was nothing else up there for me.

Q. You went back up to Chicago again?

A. Yes.

Q. Was that like a day later?

A. It was the same night.

* * * * * * *

Q. O. K., why did you go back to Chicago the second time that evening?

A. Because Agnes told me that she was going to try to start her own prostitution house up in Chicago, and——

Q. And you were going to be one of her starting girls?

A. Yes.

Q. And you went up to Chicago with her?

A. Yes, I did.

Q. Did you again check into the Drake, or stay with this friend?

A. We stayed with her friend, or who she said was her friend, I don't know.

Q. At any point during your stay in Chicago for this particular convention, did you engage in prostitution activities?

A. Yes, I did.

Q. Were these activities with people associated with the boat show?

A. Yes, they were.

Q. You received compensation—money?

A. Repeat that again.

Q. You got money for the acts of prostitution, correct?

A. Yes, I did.

Q. What did you do with the money?

A. Gave it to Agnes.

Q. What did Agnes do with the money?

A. I have no idea.

Q. What was your split of the money, or were you getting a straight fee?

A. I wasn't really getting anything out of it.

Q. You were working for free?

A. Yes, I mean it seemed like that to me, because Agnes was taking everything I was getting.

Q. You didn't get any money at all?

A. No.

Q. *Now while you were in Chicago for the boat show, the same time frame, who else in the world of prostitution did you meet; in other words, I am not talking about tricks that you picked up, I am not talking about social acquaintances, I am talking about what other prostitutes or people associated with prostitutes, did you meet up there?*

A. *I don't remember if I met anybody else up there or not.*

Q. *O. K., you met Agnes?*

A. *Yes.*

Q. *You met Agnes's friend?*

A. *Yes.*

Q. *You met a girl named Marilyn?*

A. *Yes.*

Q. *That's it?*

A. *That's all.*

Q. *Nobody else?*

A. *Nobody else that I can remember, no.*

Q. Nobody else?

A. That I can remember.

* * * * * * * *

Q. Do you recall an argument over one of the tricks, one of the men up there, between you and other girls, or did you actually see such an argument?

A. No, I didn't see or hear of anything of that sort.

Q. You did not associate with any other working girls up there, aside from Agnes and her friend and Marilyn?

A. Not to my knowledge, at all.

* * * * * * * *

Q. Did you know any of the other girls who worked for Pat Rich as prostitutes?

A. There was one girl that I can recall, by the name of Kathy Bray, I think she lives over in Illinois, I am not for sure.

Q. How did you meet her?

A. I met her over at Pat's, she introduced herself to me, I walked in and she was there; she started talking.

Q. That's the only other girl you have met at Pat's who works as a prostitute for Pat?

A. That's the only one.

Q. Have you ever met any other girls at Pat's?

A. No, because every time I go in there she is the only one there.

Q. In other words, every time you have gone into her house except for once when you saw Kathy Bray, there have been no girls there?

A. Right.

Q. None of them working?

A. No.

* * * * * * * *

Q. Have you ever gone to the state of Nevada? Las Vegas, Reno, Winnemucca?

A. No.

Q. Have you ever gone to the state of Nevada for purposes of prostitution?

A. Huh-uh.

Q. Have you ever returned from the state of Nevada to St. Louis for purposes of prostitution?

A. No, that I can remember.

* * * * * * * *

Supreme Court, U. S.
FILED
OCT 25 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-186 and 78-314

In the Supreme Court of the United States

OCTOBER TERM, 1978

JACQUELINE RICH, PETITIONER

v.

UNITED STATES OF AMERICA

LLOYD M. PELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JODY M. LITCHFORD
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2-4
Argument	4-16
Conclusion	16

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165	8
Baker v. *United States*, 310 F.2d 924	13
Brady v. *Maryland*, 373 U.S. 83	11
Caminetti v. *United States*, 242 U.S. 470	12
Gavino v. *MacMahon*, 499 F.2d 1191	6
Harms v. *United States*, 272 F.2d 478	13
Hoke v. *United States*, 227 U.S. 308	13
Schaffer v. *United States*, 362 U.S. 511	15-16
Taglianetti v. *United States*, 394 U.S. 316	8
Tileston v. *Ullman*, 318 U.S. 44	12
United States v. *Amaya*, 533 F. 2d 188, cert. denied, 429 U.S. 1101	11
Ungar v. *Sarafite*, 376 U.S. 575	6
United States v. *Crow Dog*, 532 F.2d 1182, cert. denied, 430 U.S. 929	9
United States v. *Eddy*, 549 F.2d 108	9
United States v. *Figueroa-Paz*, 468 F.2d 1055	15
United States v. *Garrett*, 521 F.2d 444	12, 13
United States v. *Gougiz*, 774 F.2d 958	15
United States v. *Hill*, 248 U.S. 420	13

Cases—Continued — Page

United States v. *Mardian*, 546 F.2d 973 — 15
United States v. *Martinez*, 428 F.2d 86, cert. denied, 400 U.S. 881 — 8
United States v. *Porter*, 441 F.2d 1204, cert. denied, 404 U.S. 911 — 15
United States v. *Raines*, 362 U.S. 17 — 12
United States v. *Ruggiero*, 472 F.2d 599, cert. denied, 412 U.S. 939 — 12
United States v. *Uptain*, 531 F.2d 1281 — 6
United States v. *White*, 401 U.S. 745 — 8

Statutes and rules:

Mann Act:

18 U.S.C. 2421 — 2, 3
18 U.S.C. 2422 — 2, 3, 13
18 U.S.C. 2511(2)(d) — 8

Fed. R. Crim. P.:

Rule 8(b) — 14
Rule 14 — 14, 15
Rule 16 — 7, 8
Rule 16(a)(1)(A) — 6
Rule 16(d)(1) — 7, 8, 9
Rule 20 — 3

Fed. R. Evid.:

Rule 804 — 10, 11
Rule 804(a)(1) — 11

Miscellaneous:

Advisory Committee Note to 1974 Amendment to Rule 16, Fed. R. Crim. P. — 9
1 C. Wright, *Federal Practice and Procedure* (1969) — 15

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-186

JACQUELINE RICH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-314

LLOYD M. PELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 578 F.2d 701.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1978. Petitions for rehearing were denied on July 3, 1978 (No. 78-186) and July 24, 1978 (No. 78-314). The petition for a writ of certiorari in No. 78-186 was filed on August 2, 1978, and the petition in No. 78-314 was filed on August 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a motion for continuance should have been granted to petitioner Rich.

2. Whether a pretrial motion for discovery of recorded telephone conversations of petitioner Rich was properly denied.

3. Whether the government precluded petitioner Rich from interviewing its witnesses.

4. Whether the grand jury testimony of Kathleen Waggoner should have been made available to petitioner Rich for use as evidence at trial.

5. Whether the Mann Act, 18 U.S.C. 2421 and 2422, is constitutional.

6. Whether, in the circumstances of this case, petitioner Pelton waived his right to assert a severance claim, and whether his trial with petitioner Rich denied him a fair trial.

STATEMENT

Petitioners and Ann Frazier were charged in an eight count indictment returned in the United States

District Court for the Eastern District of Missouri with various offenses growing out of a prostitution business in St. Louis. Counts I through IV charged petitioner Rich and Frazier with violating the Mann Act, 18 U.S.C. 2421 and 18 U.S.C. 2422, by conspiracy to transport and transporting three women to Chicago between September 29, 1976 and October 2, 1976. Counts V through VIII charged both petitioners with Mann Act violations involving three women transported to Nevada between October 7, 1976 and October 15, 1976. Following a jury trial, petitioner Rich was found guilty on seven counts and petitioner Pelton was found guilty on two counts.[1] Petitioner Rich was sentenced to concurrent terms of five years' each on counts I through IV. She was sentenced to concurrent terms of five years' each on counts V, VI, and VII to be served consecutively to the sentences for counts I through IV, for a total of ten years' imprisonment. Petitioner Pelton was sentenced to three years' imprisonment on each count, the terms to be served concurrently. The court of appeals affirmed (Pet. App. A19).

The evidence at trial showed that Fred Coughlin, a local businessman, telephoned petitioner Rich in late September, 1976, and asked to have two prostitutes go with him to a boat show to be held in Chicago in early October (Tr. 72). She agreed to send two of the women she employed. Coughlin subsequently picked up two women, Kathy Bray and

---

[1] Frazier pleaded guilty in Chicago under the provisions of Fed. R. Crim. P. 20.

Charlotte Anderson, at Rich's home in St. Louis and drove them to Chicago (Tr. 72-76). Petitioner Rich also made independent arrangements to sent a third woman, Kathleen Waggoner, to Chicago to work as a prostitute (Tr. 105-108).

Kathy Bray become ill while in Chicago and returned earlier than expected to St. Louis (Tr. 109). Upon returning, Bray met with petitioners Rich and Pelton at Rich's home (Tr. 111-112). Plans were then made to send Bray and another woman to Winnemucca, Nevada for purposes of prostitution (Tr. 110-117). Petitioner Pelton called Penny's Cozy Corner, a house of prostitution in Winnemucca, and arranged for the women to work there (Tr. 113-117). Similar arrangements were made with respect to Shirley Dawson (Tr. 120). Pelton was to receive $200 per girl for his part in their placement (Tr. 114). Bray and Dawson subsequently traveled by airplane to Nevada pursuant to the arrangements made by petitioners (Tr. 117, 189).

ARGUMENT

1. The court below properly concluded that the trial court's denial of petitioner Rich's motion for continuance did not constitute an abuse of discretion (Pet. 14-19).

Petitioner Pelton was arraigned on July 11, 1978 and the district court set an August 1 trial date (Tr. 2). When petitioner Rich was arraigned on July 18, 1978, seven days after her arrest, defense counsel requested a change in the trial date to August 15 or August 22 because counsel was moving his office as of August 1 (Tr. 3-4). The trial judge denied this request and on July 28, Rich filed a motion for a continuance.[2] When the case was called for trial on August 1, counsel for Rich again urged that a continuance should be granted, asserting that personal problems involved in relocating his office impeded his trial preparation (S. Tr. 15-16) and that he desired to interview codefendant Ann Frazier in Chicago to determine her availability as a witness (S. Tr. 15-17).[3] At this point, government counsel expressed opposition to the granting of a continuance, pointing out that two witnesses were already in protective custody and expressing fear that delay of the trial could lead to the unavailability of witnesses. The court then denied the motion and the trial commenced (S. Tr. 18-20).

There was no abuse of discretion here. While petitioner based her motion primarily on counsel's personal exigencies, the government presented specific reasons against the motion, reasons going to the very heart of the prosecution. To be sure, counsel also stated that he needed more time for investigation, but he specifically called the court's attention only to the possibility of using codefendant Frazier as

---

[2] Pelton filed a motion for a continuance on July 27.

[3] Defense counsel had spoken to the public defender who represented Frazier in Chicago. Counsel also said that the case involved investigation in Nevada and research of Nevada law which he had not been able to complete (S. Tr. 15-16). "S. Tr." refers to the "Supplementary Transcript" of the pretrial proceedings on August 1, 1977.

a witness. Significantly, he did not say that her defense counsel, whom he had contacted, had ever indicated that she would be available either as a witness or for an interview. In these circumstances, the court below properly concluded that petitioner supported her motion "with the speculation that there might be witnesses in Chicago and Nevada." Further, as the court of appeals noted, Rich was vigorously defended at trial (Pet. App. A-5). Given these factors, the trial court's refusal to grant a continuance was proper.[4] See *Ungar* v. *Sarafite*, 376 U.S. 575 (1964); *United States* v. *Uptain*, 531 F.2d 1281 (5th Cir. 1976).

2. Contrary to petitioner Rich's contention, the district court did not err in refusing to grant her pretrial request under Rule 16, Fed. R. Crim. P., for discovery of recordings of her voice which were in the possession of the government.

Rule 16(a)(1)(A) provides in part that, at the request of the defendant, the government shall permit the defendant to inspect and copy any relevant recorded statements made by the defendant within the possession of the government. But Rule 16(d)(1) provides that the court may deny such discovery upon a sufficient showing, including an *ex parte* showing. Before trial, petitioner made a request under Rule 16 for tape recordings of her voice in the possession of the government and moved to suppress the fruits of electronic surveillance. At argument on the pretrial motions, the government stated that all of its recordings of petitioner Rich were taken by cooperating individuals, rather than by government agents, that it did not intend to use such material in its case in chief and that it requested a Rule 16(d)(1) protective order restricting the discovery of such material "until such time as the government witness takes the stand and actually testifies about the occurrence" (S.Tr. 9-10). On behalf of Rich, her attorney addressed himself to the issue of electronic surveillance and pointed out that the government had advised him that it had recordings of his client's voice that it had permitted the court to hear. He argued that these recordings were statements of the defendant subject to discovery under Rule 16 as electronic surveillance material.

Finding nothing exculpatory in the material and invoking Rule 16(d)(1), the court ruled that the tape recordings should be sealed and made a part of the record (S. Tr. 10-11). On appeal, the government in its brief advised the court of appeals and petitioner Rich that the tape recordings of her voice, its electronic surveillance material, consisted of "voluntary interceptions by one of the parties" and showed "repeated attempts by the defendant Rich to stop potential witnesses from testifying or providing information". Brief for the United States, pp. 13-14, 7. The court below, in reviewing the record, examined the sealed tape recordings of petitioner Rich's voice and,

[4] Petitioner asserts that a conflict exists between the court of appeals decision in this case and decisions of other courts of appeals (Pet. 17-19). The cases cited by petitioner, however, do not reveal any conflict in the standard applied, but reflect fact patterns dissimilar from this case. See, *e.g.*, *Gavino* v. *MacMahon*, 499 F.2d 1191 (2d Cir. 1974), where the government was willing to consent to a continuance.

finding that Rich had not been prejudiced by being denied access to the tapes, upheld the protective order under Rule 16(d)(1).

This decision was correct. Petitioner Rich was properly denied access to this material both as an aid to her defense on the merits and as an aid to a suppression motion. This is not a case such as *Alderman* v. *United States*, 394 U.S. 165 (1969), where there were substantial grounds for supposing that the government's case might have been tainted by an illegal electronic surveillance by government agents, and there was therefore a need for the defendant to see the materials.[5] Here, on the contrary, as petitioner was told before trial, her voice was recorded by cooperating individuals and not by government agents, and, of course, recordings made by one party to a communication or with the prior consent of one such party are legal. *United States* v. *White*, 401 U.S. 745 (1971); 18 U.S.C. 2511(2)(d). In addition, it is in any event difficult to see how recordings made while petitioner Rich was trying to influence prospective government witnesses could have tainted the government's case.[6]

It follows that petitioner Rich's Rule 16 claim must stand or fall on the separate allegation that she was

[5] See also *Taglianetti* v. *United States*, 394 U.S. 316 (1969); *United States* v. *Martinez*, 428 F.2d 86 (6th Cir.), cert. denied, 400 U.S. 881 (1970).

[6] Petitioner says that unindicted co-conspirator Etta Williams "was obviously the government's source of information leading to the indictment" (Pet. 22).

improperly denied discovery of material that would have aided her defense at trial. While, ordinarily, a criminal defendant is entitled to access to her statements, Rule 16(d)(1) allows the court to deny or restrict such discovery. Where the materials involve, as here, attempts by a defendant to influence witnesses, there is a valid ground for denying discovery to protect the identity of persons cooperating with the government.[7]

Such discovery decisions are committed to the sound discretion of the trial court and are reversible only upon a showing that the error was prejudicial to the defendant's substantive rights. *United States* v. *Eddy*, 549 F.2d 108 (9th Cir. 1976); *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977). Here, the trial judge, having heard the recordings, concluded that they contained no exculpatory material helpful to the defense. There is no basis for suggesting that discretion was abused.

3. Petitioner Rich also contends (Pet. 22-25) that the district court erred in denying her pretrial motion "to make witnesses and statements available."

Insofar as petitioner Rich is urging an inability to interview Charlotte Anderson, Kathleen Waggoner, Kathy Bray and Shirley Dawson, women alleged to have been transported for immoral purposes, the short answer to this complaint is that she should have ad-

[7] Indeed, the Advisory Committee Note to the 1974 Amendment to Rule 16 make it clear that in such circumstances discovery may be withheld consistently with *Alderman* v. *United States*, *supra*.

vised the trial court that she wanted to interview these women and had been unable to do so. Her motion identified only Etta Williams, an unindicted co-conspirator, and, in oral argument before the district court she only noted an interest in interviewing Ann Frazier, a codefendant. As to the latter, Rich's counsel talked to her attorney and should have asked him if she would have been available for an interview. As to Etta Williams, we rely on the answer of the court below. Williams, who petitioner states was the initial source of information in this case, was not used as a government witness and it was sufficient that she was made available for an interview during the trial. In sum, there is nothing in the record that indicates that the government impeded Rich's investigation. While the government had undertaken to protect two witnesses, this was a result of the witnesses' fears and not of any desire by the government to conceal evidence (S. Tr. 18-21; Tr. 173).

4. One count of the indictment charged Rich with transporting Kathleen Waggoner to Chicago. Pursuant to a grant of immunity, Waggoner testified before the grand jury and denied that Rich sent her to Chicago (Tr. 218-225). Waggoner was subsequently indicted for perjury as a result of this testimony (Tr. 219). Petitioner Rich contends (78-186 Pet. 25-30) that she should have been allowed to introduce portions of the grand jury testimony of Waggoner, pursuant to the unavailable witness provision of Rule 804 of the Fed. R. Evid. (Tr. 219). She

also argues that the government breached its duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in refusing to grant her access to the grand jury testimony of Waggoner. The related contentions made here were rejected by the court below, on whose opinion we essentially rely.

The grand jury testimony was not admissible under Fed. R. Evid. 804 which governs the admissibility of out of court statements of unavailable witnesses. Section (a)(1) of the Rule, relied on by petitioner (Tr. 220), defines a witness as "unavailable" if he "is exempted *by ruling of the court* on the ground of privilege from testifying concerning the subject matter of his statement" (emphasis added). The proponent of the evidence has the burden of proving the unavailability of the declarant. *United States* v. *Amaya*, 533 F.2d 188 (5th Cir. 1976), cert. denied, 429 U.S. 1101 (1977). However, in this case, the sole indication that Waggoner was unavailable was an unsworn assertion by petitioner's counsel that Waggoner's attorney would advise her to refuse to testify (Tr. 218). As the court of appeals noted (Pet. App. A-12), such speculation constituted a wholly inadequate showing of unavailabiltiy as required by Rule 804(a)(1). The grand jury testimony was therefore properly ruled inadmissible by the trial court.

Nor was there a violation of *Brady* v. *Maryland*, *supra*. The purpose of the *Brady* rule is to assure that a defendant "will not be denied access to exculpatory evidence known to the government but *un-*

known to him." United States v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), cert. denied, 412 U.S. 939 (1973) (emphasis added). It is clear from the record that petitioner was aware of the essential contents of Waggoner's statement. In fact, Waggoner's testimony that Rich did not send her to Chicago was quoted in her perjury indictment and hence was a matter of public record (Tr. 221-222, 226). There was therefore no *Brady* violation on the part of the government.

5. Petitioner Rich contends that the Mann Act is unconstitutional in that it prohibits travel to engage in lawful acts since prostitution is legal in Nevada (Pet. 30-32).

Petitioner lacks standing to attack the statute on this ground. Petitioner herself was not accused of travelling in violation of the Act. Nor does petitioner claim to be a prostitute whose right to travel to Nevada to engage in legal acts of prostitution has been violated. As a general rule, a claimant may not raise the constitutional rights of third parties as a defense. See, *e.g.*, *United States* v. *Raines*, 362 U.S. 17 (1960); *Tileston* v. *Ullman*, 318 U.S. 44 (1943). Petitioner therefore lacks standing to attack the constitutionality of this statute. See *United States* v. *Garrett*, 521 F.2d 444 (8th Cir. 1975).

In any event, Congress may prohibit the transportation of women in interstate commerce for immoral purposes under the commerce clause of the Constitution. As this Court said in *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917):

> The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

See also *Hoke* v. *United States*, 227 U.S. 308 (1913); *United States* v. *Garrett*, *supra*. The fact that some counties in Nevada regulate, rather than prohibit, prostitution cannot affect the validity of the Mann Act, or create a special exemption for transportation of women to those localities. While Congress could fashion an exception for such circumstances if it so chose, the power of Congress over interstate commerce is not limited by such state laws. *United States* v. *Hill*, 248 U.S. 420, 425 (1919).[8]

---

[8] Petitioner also contends that the evidence was insufficient to establish inducement as required under 18 U.S.C. 2422 and to establish *mens rea* (Pet. 31-32). Both claims are without merit. The inducement element is satisfied by "any offer sufficient to cause the woman to respond," *Harms* v. *United States*, 272 F.2d 478, 481 (4th Cir. 1959), which is clearly presented by the evidence at trial which showed that petitioner Rich helped arrange the trip to Nevada and supplied Bray and Dawson with money for clothes and air fare (Tr. 114-117, 182-188). Bray testified that "Pat [Rich] and Big Lloyd [Pelton] sent me to Nevada" (Tr. 124). The *mens rea* required is only the "intent that the female transported by the accused in interstate commerce shall, after such transportation, engage in the charged immoral conduct." *Baker* v. *United States*, 310 F.2d 924, 931 (9th Cir. 1962). Again, as is clear from the record, the arrangements made by petitioners involved sending Bray and Dawson to Nevada to work as prostitutes (Tr. 114-117, 168, 182-188).

6. Petitioner Pelton's sole contention is that his failure to renew his pretrial motion for severance at the close of the government's case or at the conclusion of all the evidence did not, as the court below held, constitute a waiver of his right to assert the severance issue. We submit that, in the circumstances of this case, this Court should not review this issue.

Fed. R. Crim. P. 8(b), which governs joinder of defendants in multiple count indictments, provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Four counts of the indictment charged petitioner Rich and Ann Frazier with offenses arising out of the transportation of three women to Chicago between September 29, 1976 and October 2, 1976. The other four counts charged Rich and petitioner Pelton with offenses arising out of the transportation to Nevada between October 7, 1976 and October 15, 1976, of three women, including two of the women alleged to have been transported in the first four counts. The two sets of counts were therefore properly joined as part of the same series of transactions, and we do not understand that petitioner Pelton contends otherwise.

Nor was severance needed to avoid a prejudicial joinder of petitioner Pelton under Rule 14, Fed. R.

Crim. P. Although the Chicago and Nevada trips were two separate excursions, they were both part of the same overall operation. The prostitutes worked for the same madam out of the same house (Tr. 104-108, 182). The trips were arranged within two weeks of each other and the arrangements were made at the same location (Tr. 72-73, 91, 111). One of the women was sent to both locations and she was the government's chief witness as to both trips. Even if Pelton had been tried alone, it would have been evident that Rich and the women that were transported had been previously involved in prostitution activities. The case was not complex and Pelton's role, making arrangements for the Nevada trip, was simple. It was sufficient that the jury was cautioned on two separate occasions to keep the evidence as to the two different defendants separate (Tr. 9, 295-296).

We recognize that the courts of appeals have not been consistent on whether a motion for relief from prejudicial joinder is required. Compare *United States* v. *Porter*, 441 F.2d 1204, 1212 (8th Cir.), cert. denied, 404 U.S. 911 (1971), and *United States* v. *Figueroa-Paz*, 468 F.2d 1055 (9th Cir. 1972), with *United States* v. *Gougis*, 374 F.2d 758 (7th Cir. 1967), and *United States* v. *Mardian*, 546 F.2d 973, 979 (D.C. Cir. 1976). See also 1 C. Wright, *Federal Practice and Procedure* § 221, at 432-435 (1969). We submit that these differences need not be resolved in a case such as this where, as we have shown, there was no prejudice. We are content to rely on the rule announced in *Schaffer* v. *United States*, 362 U.S. 511,

516 (1960), to the effect that there is a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." But, here, as there, petitioners "failed to show any prejudice that would call Rule 14 into operation."

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JODY M. LITCHFORD
Attorneys

OCTOBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 276123 153